

RECENT DEVELOPMENTS AND CURRENT TRENDS ON BRAZILIAN PRIVATE INTERNATIONAL LAW CONCERNING INTERNATIONAL CONTRACTS

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Abstract: This work aims to present the recent changes and the current trends of Brazilian Private International Law in the area of international contracts with especial focus on the enforcement of Convention on the International Sale of Goods (CISG) in Brazilian legal order. Historically, the recognition of party autonomy in Private International Law has not been uniformly recognized. While since 1996, with the enforcement of the new Arbitration Law, party autonomy has been increasingly accepted in terms of international arbitration, jurisprudence on the choice of law and the choice of court clauses does not show the same progress. In fact, despite of important documents which have already been signed by the government, Brazilian Private International Law of Contracts still dates from 1942. Such contrast with internal material law represents a challenge for the full recognition of Party Autonomy in Brazilian Private International Law.

Keywords: Brazilian Private International Law - CISG - Party Autonomy - International contracts.

1. INTRODUCTION

While we live in a world where States possess their own legal orders, applicable in principle within their borders, international trade requires that several legal systems coexist simultaneously and communicate with each other. In this context, international contracts function as bridges connecting different national systems. In many occasions, disputes might arise, bringing into question which law will

govern these agreements, the so-called conflicts of laws, the resolution of which is the main subject of Private International Law.

In search for a solution to the legal uncertainty caused by the coexistence of different legal national systems, states have used several codification mechanisms to achieve uniformity and harmony in determining the law applicable to international contracts.

With that goal in mind, several initiatives have been launched internationally, such as the 1980 Convention on the Law Applicable to Contractual Obligations (the Rome Convention). The Convention was later replaced by the Rome I Regulation (EC) 593/2008, which currently governs choice-of-law in the European Union.

In Latin America, by means of the codification efforts of the Organization of American States (OAS), the Inter-American Convention on the Law Applicable to International Contracts (the Mexico Convention) was signed in 1994. In spite of the fact that it has only been ratified by Mexico and Venezuela¹, the Convention constitutes an important development, having gone beyond the Rome Convention which inspired it².

Just recently, in November 2012, the Special Commission on Choice of Law in International Contracts of the Hague Conference on Private International Law has approved the Draft Principles on Choice-of-Law in International Contracts and recommended its endorsement by the Council and the preparation of a Commentary³. Once definitively approved by the Conference, the principles will constitute important soft law in the field, and may be used by international arbitrators and serve as model for national legislators.

At the same time, national legal systems comprise private international law rules for the solution of conflicts of laws, whenever a case may arise concerning a situation with international ties, involving different legal orders. Thus, whether using national rules or international conventions, the judge of a dispute where an international contract is the main issue shall have the tools to decide which law to apply to a given case.

For purposes of this study, what characterizes a contract as international is the presence of a foreign element that connects it to two or more national legal orders. For example, it may be sufficient that one of the parties be domiciled in a foreign country, or that the contract be

¹ The Convention has been signed by Bolivia, Brazil, Mexico, Uruguay and Venezuela. So far, only Mexico and Venezuela have ratified it, according to information available at the website of the Organization: <http://www.oas.org/juridico/english/sigs/b-56.html> (March, 2013)

² Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 *Am. J. Comp. L.* 195, at 204 (1997).

³ Draft and recommendation available at the website of the Hague Conference: http://www.hccnet.net/index_en.php?act=text.display&tid=49 (March, 2013).

signed in one country to be performed in another⁴.

Amongst the existing rules in the matter of international contracts and applicable law, party autonomy – the freedom of the parties to determine the law applicable to their agreement – has been acknowledged as a universal principle by scholars and legislations⁵. The doctrine provides legal certainty and predictability to the parties and is widely accepted as a means for efficiency⁶. Its emergence “has little to do with a preference for private ordering or other theoretical musings”, but with a very practical concern, due to the proliferation of transboundary contracts, and, consequently, the number of potential disputes arising out of them⁷. Furthermore, party autonomy and free choice of law stand on firm economic grounds⁸.

In spite of encouraging improvements such as the enactment of the 1996 Arbitration Act and the recent ratification of The United Nations Convention on Contracts for the International Sale of Goods (CISG)⁹, Brazilian Law still has not made a definitive and unmistakable move to embrace party autonomy in choice of law.

In recent years, Brazilian legal order has experienced profound transformations. Although the interest of people and especially international groups in the country increased significantly, propelled by the necessity of major infra-structure direct investments, at the same

4 As the rules of conflict vary from country to country, their harmonization is sought through the creation of a system of uniform law conventions.

5 Ole Lando, *The EEC Convention on the Law Applicable to Contractual Obligations*, 24 *Common Market L. Rev.* 159 1987, 169. “The parties’ right to choose the law which governs an international contract is so widely accepted by the countries of the world that it belongs to the common core of the legal systems. Differences only exist concerning the limits of the freedom of the parties. Some countries seem to allow the parties an almost unrestricted freedom to choose the applicable law. Others limit their freedom either by demanding a local contact with the legal system chosen or by excluding some questions which are covered by mandatory rules or some contracts from being affected by the parties’ choice of law.”

6 See Dana Stringer, *Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way*, 44 *Colum. J. of Transnat’l L.* 959 (2005-2006), 960.

7 Mathias Reimann, *Savigny’s Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 *Va. J. Int’l L.* 571, 589 (1999).

8 Giesela Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, CLPE Research Paper 4/2007 Vol. 03 No. 01 1, 33 (2007). See also Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 *U. Chi. L. Rev.* 1151 (2000), for an analytical efficiency approach to the choice-of-law problem.

9 Brazil acceded to the CISG on 03.04.2013 with the deposit of the ratification instrument with the United Nations Secretary General. The Convention will enter into force in its territory on 04.01.2014: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (March, 2013).

time, more local enterprises are “going global”, thus establishing a very strategic dual flow of interconnected legal relationships.

This paper will present the Brazilian approach to the determination of the law applicable to international contracts, describing the rules regarding international contracts, and the current stage of acceptance of party autonomy. We will also discuss how the question is treated in comparative law. In conclusion, we present solutions to ascertain the enforcement by the Courts of the choice-of-law clause in an international contract with a connecting factor in Brazil.

2. BRAZILIAN PRIVATE INTERNATIONAL LAW: PARTY AUTONOMY

Brazilian rules of international private law are encompassed in the Law of Introduction to the Brazilian Civil Code, Decree-Law no. 4.657, of 1942, under Articles 7 to 17¹⁰. Brazilian Private International Law follows the traditional system of conflict of law, comprising indirect rules of a bilateral nature¹¹.

The rule pertaining to international agreements is set forth by Article 9¹². The provision reads as follows in its entirety:

“Art. 9 - In order to characterize and govern the obligations, the law of the State in which they

10 In 2010 the mentioned legislation was renamed by the L. 12.376-2010. It is now known as “Lei de Introdução às Normas do Direito Brasileiro” - Law of Introduction to the Norms of Brazilian Law.

11 Conflict rules - of an indirect nature - are those which, instead of directly settling the quaestio juris (“issue of law”), substantially regulating the fact or legal situation, only indicates the legal system where the solution must be sought. Under another perspective there are the bilateral rules of private international law, which answer the question: “Which is the applicable law?”, as opposed to the unilateral rules, which answer: “When does the national law apply?”

12 For a selected bibliography on Private International Law and International Contracts in Brazil, see: NADIA DE ARAUJO, *CONTRATOS INTERNACIONAIS: AUTONOMIA DA VONTADE, MERCOSUL E CONVENCOES INTERNACIONAIS*, (2009); WILSON DE SOUZA CAMPOS BATALHA, *TRATADO DE DIREITO INTERNACIONAL PRIVADO*, vol. I and II, 2nd. ed., São Paulo, Ed. RT, 1977; AMILCAR CASTRO, *DIREITO INTERNACIONAL PRIVADO*, 4th. ed. with notes by Osiris Rocha, Rio de Janeiro, Ed. Forense, 1987. MARIA HELENA DINIZ, *LEI DE INTRODUÇÃO AO CÓDIGO CIVIL INTERPRETADA*, São Paulo, Ed. Saraiva, 1994; JACOB DOLINGER, *DIREITO INTERNACIONAL PRIVADO*, 4th. ed., Rio de Janeiro, Ed. Renovar, 1996; JOÃO GRANDINO RODAS, *DIREITO INTERNACIONAL PRIVADO BRASILEIRO*, São Paulo, Ed. RT, 1993, and *Elementos de conexão do Direito Internacional Privado Brasileiro, relativamente às obrigações contratuais*, in JOÃO GRANDINO RODAS (org.), *CONTRATOS INTERNACIONAIS*, São Paulo, Ed. RT, 1st ed., 1985, 1-36, 2nd ed. Updated, 1995, 9-49.

are constituted shall apply. § 1. In the event that the obligation shall be performed in Brazil and depending on an essential form, this one shall be observed, being admitted the peculiarities of the foreign law, as to the extrinsic requirements to the act. § 2. The obligation arising from the contract is deemed to be constituted at the place in which the proponent resides.”

From the provision above it is possible to understand that under Brazilian law the rule applicable to international agreements will be primarily, “the law of the State in which they are constituted”. However, if the agreement is entered into by correspondence, the law of the proponent will be applicable. In any event, if the obligation is to be performed in Brazil, any essential forms required by Brazilian law shall be observed.

It is important to understand that the Law of Introduction was enacted in 1942 amidst the Second World War, when an unprecedented afflux of immigrants reached Brazilian shores. As a consequence of that, Brazilian law changed substantially and adopted a territorial and nationalist approach to conflict of laws¹³.

The previous 1916 Introduction to the Civil Code contained language that allowed the parties to an agreement to choose the law that best suited them¹⁴, and with the elimination of that wording, a controversy was born. Did the legislator intend to forbid contracting

13 Lauro da Gama e Souza Jr, *Autonomia da vontade nos contratos internacionais no Direito Internacional Privado brasileiro: uma leitura constitucional do artigo 9o, da Lei de Introdução ao Código Civil em favor da liberdade de escolha do direito aplicável*, in *O DIREITO INTERNACIONAL CONTEMPORANEO. ESTUDOS EM HOMENAGEM AO PROFESSOR JACOB DOLINGER* (Rio de Janeiro, Renovar, 2006) 599, 605. The great number of immigrants forced Brazil to change the conflict of law rule regarding personal status, from the law of the nationality to the law of the domicile. This is regarded as the greatest change embodied in the Law of Introduction to the Civil Code of 1942.

14 Article 13 of the 1916 Introduction to the Civil Code stated that the substance and the effects of the obligations would be governed by the *lex loci contractus*, except when the parties had agreed otherwise. The Introduction indicated a few exceptions to the principle which directed the mandatory application of Brazilian law. Those exceptions regarded, in special, contracts executed abroad, but to be performed in Brazil, obligations entered into by Brazilian citizens in a foreign country, and real property located in Brazilian territory. Original text available at: <http://www6.senado.gov.br/legislacao/ListaPublicacoes.action?id=102644&tipoDocumento=LEI&tipoTexto=PUB>. Regardless, as pointed out by Paul Griffith Garland, Brazilian courts at the time tended to determine the application of Brazilian law, in spite of the contractual choice, by means of the exceptions to Article 13, in special the one regarding the place of performance. See PAUL GRIFFITH GARLAND, *AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW*, 51-53 (1959).

parties from choosing the law applicable to their agreements? Brazilian scholars are generally divided in three groups, who answer the question differently.

The first group believes that the exclusion of that wording was intentional, and that party autonomy has consequently been forbidden under Brazilian law, to whom the *lex loci celebrationis* will always be applicable. This rule would be mandatory and thus cannot be derogated by the parties.

The second group defends that party autonomy has not been definitively precluded, but only limited in that parties can still make a valid choice of law, as long as it is allowed under the law of the place where the contract is concluded. Party autonomy would then be *indirect*.

The third group understands that choice of law is a doctrine alive in Brazilian law, since it has not been expressly excluded by the 1942 Law of Introduction. Scholars who share this belief point out that Article 9, § 2o, use the verb “reputa-se”, which translates as “is presumed”. The verb would represent the same caveat as “unless otherwise agreed by the parties”, which was present in the 1916 Introduction. Bearing also in mind the provision of Article 42 of the then-valid Civil Code, which allowed parties to designate their domicile for contractual purposes, those authors affirm that party autonomy has not disappeared from Brazilian law¹⁵.

More recently, Prof. da Gama e Souza Jr. advanced a new argument defending the validity of party autonomy in Brazilian law¹⁶. Prof. da Gama e Souza Jr. points out that the 1988 Brazilian Constitution has elevated civil liberties to the constitutional status of fundamental rights¹⁷. Among such rights is the principle of legality, which surpasses the strict boundaries of the criminal law and governs all aspects of civil life, providing that “no one shall be obliged to do or refrain from doing something except by virtue of law”¹⁸.

Therefore, construing Article 9 in accordance with the constitutional provision, in the absence of a rule expressly precluding the contracting parties from choosing the law to govern their agreement, it must be admitted that this freedom subsists¹⁹.

Brazilian courts have never directly faced the issue regarding

15 Jacob Dolinger, in da Gama e Souza Jr, *supra* note 12, at 608.

16 *Id.* at 611-614.

17 *Id.* at 613.

18 Article 5(II), of the 1988 Brazilian Constitution. In regard of the Public Administration, however, the principle reads in the opposite way: the Administration may do exclusively what is expressly allowed by the law, as provided by Article 37 of the Constitution. Full text in Portuguese available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm (March, 2013).

19 da Gama e Souza Jr, *supra* note 12, at 622-623.

party autonomy, and in the few decisions where it has come up as an incidental question, courts have hesitated to follow a consistent path, tending to favor the application of Brazilian law, either as *lex loci contractus*, or as *lex executionis*²⁰.

In spite of opinions to the contrary, we believe that the Law of Introduction currently in force has no clear provision authorizing party autonomy as does European Law. The system adopted by the existing statute for the determination of the law applicable to contractual obligations is, in principle, the *lex loci celebrationis*. However, we believe they will be able to indirectly choose the applicable law, choosing the law of the place where the agreement is executed or by making a valid choice under the *lex loci celebrationis*.

It is also relevant to note that party autonomy is fully accepted in arbitration proceedings, pursuant to the Arbitration Act, Law n. 9307 of 1996. Article 2(1) of the Act provides that the parties will be able to freely choose the legal rules which will be applicable in arbitration. The provision was perceived as a sign that Brazil was willing to modernize its legislation, but to this day that has not happen.

There have been significant developments on certain aspects on the Brazilian practice of Private International Law, and such progressive tendencies can be noticed in the judicial recognition and enforcement of international arbitral awards.

The Draft Project on a new Code of Civil Procedure is one of these developments. The Draft's Article 25 has embodied party autonomy in regard to choice of forum, when expressly provided for in an international contract. This express permission is in line with the Hague Conference Convention on Choice of Court Agreements of 2005, and fully support the party autonomy principle²¹.

These developments raised the country awareness around the need for venues of international cooperation in civil and criminal matters. However, as it will be demonstrated properly, Brazilian PIL system still has a lot to catch up with contemporary standards and developments.

Also, the UNITED NATIONS CONVENTION ON

20 Stringer, *supra* note 6, at 974-976.

21 Art. 25. Não compete à autoridade judiciária brasileira o processamento e o julgamento da ação quando houver cláusula de eleição de foro exclusivo estrangeiro em contrato internacional, arguida pelo réu na contestação. Parágrafo único. Não se aplica o disposto no caput às hipóteses de competência internacional exclusiva previstas neste Capítulo. (Article 25. The Brazilian judicial authority does not have jurisdiction when there is an exclusive clause on choice of a foreign court in an international contract as long as it is presented by defendant in its first appearance. (1) This article is not applicable when the hypothesis is concerned with Brazilian exclusive jurisdiction cases.)

CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) (CISG), which Brazil has recently ratified, recognizes the principle of party autonomy. Article 6 of the Convention provides for the freedom of the parties to “exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions” in their international transactions. In the words of Ole Lando, the CISG is “The achievement that comes the closest to establishing general principles of contract law”²².

Nonetheless, at least until the Law of Introduction is revised²³, full acceptance of party autonomy is limited to contracts that are submitted to arbitration proceedings. As from April 1, 2014, when the CISG enters into force in Brazil, it will be also accepted in contracts for the international sale of goods.

Internationally, Brazil participated extensively in the negotiations of the Mexico Convention on the Law Applicable to International Contracts, which took place in 1994, under the sponsorship of the OAS.

The Convention shall be applicable to international contracts where parties “have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party”. It shall also apply to contracts to which “States or State agencies or entities are party, unless the parties to the contract expressly exclude it”. As regards party autonomy, Article 7 of the Convention provides that “The contract shall be governed by the law chosen by the parties”, limited by the application of mandatory rules (Article 11) or the public order of the forum (Article 18).

Under the Convention, the choice of law may be express, or “evident from the parties’ behavior and from the clauses of the contract, considered as a whole”, and it may be modified at any time (Article 8).

The Mexico Convention has been signed by Bolivia, Brazil, Mexico, Uruguay and Venezuela. In spite of that, the Convention has had very limited success, having been adopted so far only by Mexico and Venezuela²⁴. For reasons unclear to the authors, until this day Brazil has not send it to the Legislative Power for ratification.

Case law varies widely throughout the country in regard of party autonomy. In some few decisions by the São Paulo and Rio de Janeiro State Courts, choice-of-law provisions were enforced and the principle

22 Ole Lando, *Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?*, 40 *Am. J. Comp. L.* 573, 575 (1992).

23 There have been attempts to derogate the Law of Introduction, but none has so far succeeded: Draft Act 4,905, of 1995, which was withdrawn after two years of deliberations, with positive review at the Chamber of Deputies, and Draft Act 269, of 2004, which has been filed without deliberations.

24 Information available at: <http://www.oas.org/juridico/english/sigs/b-56.html>, as of 11.17.2011.

was accepted. In other decisions, the courts have put the provisions aside and applied Brazilian law instead. One cannot say that there is widespread support for the principle or ascertain a judicial trend favoring party autonomy²⁵.

However, courts will not usually hesitate to enforce the choice of law clause whenever the parties have agreed to arbitrate their disputes. That is what Prof. da Gama e Souza Jr. refers to as the “Brazilian paradox”: it is the means of dispute resolution that will determine whether party autonomy is allowed, not the contractual nature of the relationship²⁶.

In light of this uncertain background, in order to be able to enforce the choice-of-law provision in an international contract, cautious parties usually prefer to sign their agreement in the country of the chosen law, in spite of the applicable law provision, or do so by correspondence, attracting the rule of Article 9 paragraph 2 of the Law of Introduction.

3. CONCLUSION

It is our view that contractual choice-of-law, as recognized by the international community is not fully supported by existing Brazilian legislation. Although we can perceive a discreet shift in the judicial atmosphere geared towards the principle of party autonomy, only with an update of Brazilian private international law rules, with new ones on party autonomy, it will be possible for parties to enjoy the same certainty as they do when submitting disputes to arbitration.

Parties to international contracts with a connecting factor in Brazil, wishing to choose the law applicable to their agreement, will

25 Recent examples of such decisions are: Acórdão n. 1758666, from Tribunal de Justiça do Estado de São Paulo, April 9, 2008, where the court found that the foreign law would be applicable in principle, but applied instead Brazilian law as *lex executionis*; Acórdão no Agravo de Instrumento n. 70005228440, Tribunal de Justiça do Estado do Rio Grande do Sul, April 8, 2003, which upheld the choice-of-law clause because the choice was allowed under the *lex loci celebrationis* (Uruguayan Law), but stated that Brazilian law does not admit party autonomy; Acórdão no Agravo de Instrumento n.1111650, Primeiro Tribunal de Alcada Cível do Estado de São Paulo, September 24, 2002, where the court found valid the application of foreign law, in view of an arbitration agreement; Acórdão no Agravo de Instrumento n.3726256, Tribunal de Justiça do Estado de São Paulo, December 1, 2011, which rejected the application of the foreign law chosen by the parties and applied Brazilian law as *lex executionis*; Acórdão na Apelação n.290653, Tribunal de Justiça do Estado de São Paulo, November 22, 2011, where the Court upheld the choice of foreign law; Acórdão no Agravo de Instrumento n.7839, Tribunal de Justiça do Estado do Rio de Janeiro, October 29, 2003, where the Court rejected application to the foreign law and determined the application of Brazilian Law in view of the public interest involved in the dispute.

26 da Gama e Souza Jr, *supra* note 12, at 609.

have the option to submit their disputes to arbitration, where, as we have seen, party autonomy is the rule.

May the contracting parties choose not to submit disputes to arbitration, they should be cautious to either execute the agreement in the country of the chosen law or in another jurisdiction that allows for party autonomy. If the agreement is perfected between absentees, they should clarify who is the proponent and its domicile, thus attracting the rule under Article 9, paragraph 2, and the applicable law will be the one of that jurisdiction.

The last great reform on Private International Law in Brazil goes all the way back to 1942, when the Introduction Law to the Civil Code (Decree-Law n° 4.657 from September 4th, 1942), partially revoked the Introduction of the 1916 Civil Code, replacing the former criteria of *lex patriae* to *lex domicilii* for solving issues regarding legal capacity, family affairs, wills and successions.

In both legislative documents, multi-connected situations are to be solved by very hermetic rules, reproducing standards from 19th century Europe. Regardless the advances verified in the United States and many other European countries (not to mention the development of European Union PIL), and even other Latin-American PIL systems, the harsh reality is that, despite honorable and commendable (but punctual) advances in certain areas, the general rules of Brazilian Private International Law are greatly lagged.

As from April 1st, 2014, when The United Nations Convention on Contracts for the International Sale of Goods (CISG) will enter into force in Brazil, parties to a contract for the international sale of goods, may also exercise their freedom in excluding the application of the Convention or derogating from or vary the effect of any of its provisions.

Therefore, under Brazilian law party autonomy may only be exercised in an indirect way. A provision stipulating the applicable law without these cautionary actions may not be enforceable in Brazilian courts, and at this point case law is not sufficiently strong to reveal a trend favoring party autonomy.

Moreover, Brazil has also signed the Mexico Convention, which provides quite broadly that “The contract shall be governed by the law chosen by the parties” (Article 7). The adoption of the convention could finally settle the issue regarding party autonomy in Brazil, at least within its scope of application, until the Law of Introduction is revised. It would also help overcome the judicial tendency to apply Brazilian law in spite of other connecting factors. Until then, however, parties who wish to choose the law applicable to a contractual agreement must also submit their disputes to arbitration or take the precautionary measures described above.

Instead of promoting such awaited qualitative changes, Brazilian government approved Law nº 12.376 (from December 30th, 2010), with the sole purpose of changing the name of the Decree-Law nº 4.657, which thus became The Introduction Law to the Rules of Brazilian Legal Order. Consequently, the two Bills dealing in Federal Legislative Houses with important and necessary reforms about Private International Law were dropped.

As we have seen, Brazilian Law still does not have a clear rule accepting the freedom of the parties to choose the law applicable to an international contract, thus providing no certainty as to the outcome of questions involving the agreement that may arise in Brazilian courts.

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